As the Commission found in the *TRRO*, such maps have "little probative value"[112] and their "value ... is undermined by several shortcomings."[113] "Due to the wide variability in market characteristics within an MSA," the Commission found that MSA-wide conclusions based on fiber deployment maps "would substantially over-predict the presence of actual deployment, as well as the potential ability to deploy."[114] Indeed, among other things, maps fail to indicate "the capacity of service ... along the competitive routes identified; if those locations require capacity only at multiple DS3 or higher capacities, and are providing revenues commensurate with those capacities."[115] In addition, maps "do not indicate whether carriers operating the fiber depicted are using these facilities to provide local service or merely interoffice transport, long-distance service, wireless service, or some combination of services other than local exchange service."[116] Further, the Commission expressly has rejected the use of fiber-based collocators as providing any probative evidence of whether ILECs should be required on an MSA wide basis to offer unbundled access to loops and transport.[117]

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[112] *TRRO*, ¶ 187.

[113] *Id.*, n.445.

[114] *Id.*, ¶ 82.

[115] *Id.*, ¶ 187.

[116] *Id.*, ¶ 188.

[117] *See TRO*, ¶ 341 (observing that the test proposed by Verizon "provides little, if any, indication that even [a collocated] competitor has been able to widely, if at all, self-deploy alternative loop facilities in that area" and that even "the presence of a single [C]LEC's collocated transport facility ... is not sufficient evidence that facilities-based competitive entry into a market ... is economically feasible."); *see also Implementation of the Local Competition Provi-*

Even if the Commission were to accept Qwest's fiber maps as informative, as explained elsewhere in this Opposition, even with this fiber competitive carriers rarely are able to find alternatives to BOC last mile facilities to most customer locations.[118] And even where they have installed fiber rings, they are able to install laterals to buildings in only a narrow range of circumstances as already found by the Commission.[119] Accordingly, Qwest's showing concerning competitive fiber does not support forbearance.

As the attached declaration makes clear, in various recent Commission proceedings where ILECs have produced maps purporting to illustrate that their competitors have extensive facilities within a particular geographic area, what the maps really demonstrated was how dependent most enterprise customers were on ILEC facilities.[120]

Accordingly, Qwest's showing concerning competitive fiber does not support forbearance.

Systems Integrators, IP Enabled Service providers and Other Competitors. Qwest contends that systems integrators and IP enabled service providers are likely to make the enterprise market more competitive.[121] As aptly pointed out in the attached ETI Declaration, systems

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sions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶¶ 131-32, 3849, ¶ 341 n.673 (1999).

[118] *See, e.g., Omaha Order*, ¶ 67 (concluding that Qwest was the only provider of wholesale access in MSA demonstrating the lack of alternatives to BOC last mile facilities.).

[119] *TRRO,* ¶¶ 149-155.

[120] *See* ETI Declaration, ¶ 41.

[121] Denver Petition at 25.

integrators and IP-enabled providers are not an additional source of competition.[122] Qwest presents them as such, however, in an attempt to mask the fact that systems integrators and IP-enabled providers usually overlap and are the same as other providers such as CLECs and VoIP providers. Nor has Qwest shown that systems integrators and IP-enabled providers are not dependent on Qwest facilities to reach customers in the vast majority of circumstances. Qwest's contentions concerning systems integrators and IP-enabled providers do not provide even one scrap of evidence showing independent facilities-based competition at the wire center or any level that could possibly support forbearance.

E. Qwest Has Not Shown Extensive Independent Last Mile Coverage

In light of the discussion in the preceding section, it is evident that Qwest has failed to show the ubiquitous and extensive independent facilities-based coverage on a wire center, or even an MSA, basis sufficient to warrant forbearance. Most of its showing concerns competitors that use Qwest facilities; wireless is not a substitute for wireline service; and its cable showing consists of little more than statements that cable operators are providing some unspecified level of service in some parts of the MSA. This falls far short of the "coverage" required by the *Omaha* and *Anchorage Orders*. Accordingly, the Petitions may be rejected for this reason alone.

F. Qwest Has Not Shown the Existence of a Viable Wholesale Market

There Is No Viable Current Wholesale Market. In the *Omaha Order*, the Commission found that where there are "very high levels of retail competition that do not rely on Qwest

[122] ETI Declaration, ¶ 33.

facilities -- and for which Qwest receives little to no revenue" Qwest has "the incentive to make attractive wholesale offerings available so that it will derive more revenue indirectly from retail customers who choose a retail provider other than Qwest."[123] On this basis, the Commission made a "predictive judgment" that Qwest would continue to make wholesale offerings available to competitors even in the absence of Section 251(c)(3) unbundling obligations.

As discussed elsewhere in these comments, Qwest has failed to demonstrate, and independent evidence shows that there are not, very high levels of retail competition that do not rely on Qwest facilities in any of the MSAs that are the subject of Qwest's Petitions. Therefore, Qwest in these MSAs does not have an incentive to make reasonable wholesale offerings to competitors and the Commission may not make a predictive judgment to that effect.

Apart from this, however, there is no basis for a finding of sufficient wholesale offerings by Qwest or others that could warrant a conclusion that transport and last mile connection will be available to competitors on reasonable terms in a forborne environment. With respect to the mass market, Qwest merely provides the numbers of VGE residential lines in each MSA provided by competitors using QPP/QLPS, its UNE-P replacement service, and via Section 251(c)(4) resale.[124] As explained in the attached Declaration of ETI, VGEs do not accurately measure competitive presence because even a few high capacity circuits will inflate the number of

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[123] *Omaha Order*, ¶ 67.

[124] Denver Petition at 16; Minneapolis Petition at 17; Phoenix Petition at 16; Seattle Petition at 17.

lines.[125] Qwest does not explain why it does not provide actual lines or why it has used VGEs in the residential market. Therefore, VGEs do not show a significant wholesale market.

Qwest's wholesale showing is also insufficient because it does not allege or show that there any independent facilities-based providers of wholesale services to serve the residential market in the subject MSAs. As the Commission found in its *Anchorage Order* the record does "not reflect any significant alternative sources of wholesale inputs for carriers in the Anchorage study area…[t]hus, continued access to the incumbent's loop facilities is important even in wire centers where there already is extensive competition."[126] Thus, wholesale services provided over Qwest facilities cannot rationally be used to undercut unbundling obligations. As the Commission has explained, "[i]t would be unreasonable to conclude that Congress created a structure to incent entry into the local exchange market, only to have that structure undermined, and possibly supplanted in its entirety, by services priced by, and largely within the control of, incumbent LECs."[127] Therefore, the Commission may not rely on Qwest wholesale services as a basis for forbearing from Section 251(c)(3) unbundling obligations.

The Commission may also not rely on the availability of either Section 251(c)(4) resale or QPP/QLS either of these services for the additional reason that they are not economically viable alternatives. Carriers use Section 251(c)(4) generally as a backstop to a UNE based

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[125] ETI Declaration, ¶ 34.

[126] *Anchorage Order*, ¶ 30.

[127] *TRO*, ¶ 48.

business plan in those situations where it is the only alternative to serve a customer's location such as when UNEs are not available because of "no facilities." QPP/QLS is only used because former UNE-P providers had no alternative after the Commission eliminated UNE-P. QPP/QLS may also not be considered as basis for forbearance because the offering has included § 251(c)(3) UNE loops along with commercial provisions for local switching.[128]

With respect to the business market, Qwest similarly claims that CLECs are providing service to certain numbers of business customers using its QPP/QLS and resale offerings in each of the MSAs.[129] This showing is insufficient for all the reasons states above concerning these offerings.

Qwest also states that CLECs are successfully serving the business market using its special access services.[130] Although the Commission in the *Omaha Order* relied in part on the availability of special access offerings as possibly supporting forbearance (although this factor apparently played a very minor role in the decision),[131] it should not do so here because the Commission has already determined that special access is not a replacement for UNEs for

[128] *See* McLeodUSA Petition for Modification; *see also* Letter from Chris MacFarland, Group Vice President and Chief Technology Officer, McLeodUSA Telecommunications Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-281 (filed Dec. 15, 2006).

[129] Denver Petition at 22; Minneapolis Petition at 23; Phoenix Petition at 23; Seattle Petition at 23.

[130] Denver Petition at 24; Minneapolis Petition at 24; Phoenix Petition at 24; Seattle Petition at 24.

[131] *Omaha Order*, ¶ 69.

purposes of local service competition because ILECs have the ability to engage in abuses, such as by raising prices, and because special access prices are constrained by the availability of UNEs.[132] Moreover, the Commission has since learned from other agencies that its current rules governing special access are likely flawed.[133] Extensive other information before the Commission shows that the Commission's pricing flexibility rules misidentify competitive areas and have permitted price cap ILECs to raise prices.[134] Accordingly, it would be arbitrary and capricious for the Commission at this point to rely on the availability of special access as a basis for forbearance with respect to the enterprise market.

The Commission May Not Make A "Predictive Judgment." In light of the lack of current viable wholesale alternatives in both the business and residential markets in the subject MSAs the Commission would be left with no more than an error prone "predictive judgment" that Qwest would make reasonable wholesale offerings in the absence of unbundling obligations. But the Commission should not do so in light of experience gained from its "predictive judgment" in Omaha.

Qwest claims that the Commission should grant forbearance from its loop and transport unbundling obligations because it makes "attractive wholesale offerings available" to UNE-

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[132] *TRRO*, ¶ 62.

[133] *See generally*, GAO Report.

[134] Comments of ATX Communications, Inc. et al, WC Docket No. 05-25, RM-10593, filed August 8, 2007, pp. 9116;Reply Comments of 360 Networks (USA), Inc. *et al.*, WC Docket No. 05-25, RM-10593, filed August 15, 2007, pp 2-4.

based carriers in the Minneapolis-St. Paul MSA "even when it has no obligation to do so."[135] In fact, however, since the Commission lifted Qwest's Section 251(c)(3) unbundling obligations in the Omaha MSA, Qwest has proposed uneconomical, onerous, and non-negotiable offerings to replace the Section 251(c)(3) network elements for the affected wire centers.

As the most impacted CLEC in the Omaha market, McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") has made it clear that the forbearance granted to Qwest in the Omaha market has made it extremely difficult for McLeodUSA to remain viable in that market and has severely devalued the investment in its network facilities.[136] Qwest's conduct in the post-forbearance Omaha market plainly contravenes the Commission's prediction that "market incentives" would motivate Qwest to continue to make reasonable wholesale offerings of loops and transport available to competitors notwithstanding forbearance from Section 251(c) UNE obligations.[137] Qwest has likewise failed to comply with its obligation to offer "just and reasonable prices" to competitors under Section 271. Rather than having incentives to set prices at competitive levels, Qwest has been very opportunistic in its pricing decisions in the absence of

[135] Minneapolis Petition at 17.

[136] McLeodUSA has submitted extensive analyses to the Commission regarding Qwest's failure to offer just and reasonable post-forbearance offerings in the Omaha MSA. In the interest of brevity, those previously filed analyses are incorporated herein by reference. *See, e.g.,* McLeodUSA Petition for Modification; *see also* Letter from Chris MacFarland, Group Vice President and Chief Technology Officer, McLeodUSA Telecommunications Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-281 (filed Dec. 15, 2006).

[137] *See Omaha Order*, ¶ 83.

Section 251(c) obligations and has taken advantage of the fact that it is the only wholesale loop provider in Omaha. With respect to McLeodUSA, Qwest has conclusively refused to negotiate wholesale pricing for voice-grade, DS1, and DS3 loops and transport for the nine affected wire centers. Instead, Qwest has only offered to replace high-capacity UNEs with special access services from its FCC Tariff No. 1, at vastly higher rates for both recurring and non-recurring charges.[138] Qwest proposes to offer stand alone DS0 loops at rates that are nearly 30% higher than what the identical network facilities could be purchased for if available as UNEs.[139]

With regard to DS1 and DS3 loops, Qwest has offered to "discount" its tariffed special access rates in the context of a "Regional Commitment Program" ("RCP") offering, but only if McLeodUSA binds itself, and is able to comply with, term and volume commitments for obtaining such facilities.[140] Because the RCP is footprint-wide, it extends outside of the nine wire centers affected by the *Omaha Order* and in areas where McLeodUSA is legally entitled to obtain such facilities as UNEs at significantly more economical cost-based rates. The scope of Qwest's bundled offer is, therefore, excessive, and it is apparent that, absent any relief from the Commission, McLeodUSA will be forced to replace the loops and transport formerly available as

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[138] McLeodUSA Petition for Modification, Declaration of Don Eben, McLeodUSA Telecommunications Services, Inc., ¶ 5 ("Eben Declaration").

[139] It is also noteworthy that McLeodUSA has approached Cox on at least two occasions regarding its willingness to entertain a commercial arrangement for McLeodUSA to lease from Cox last mile network facilities. McLeodUSA was rebuffed on both occasions. *See* McLeodUSA December 2006 Letter at 2.

[140] McLeodUSA Petition for Modification, Eben Declaration, ¶¶ 10-11.

UNEs by leasing such facilities from Qwest at a combination of prohibitive special access rates and premium DS0 "commercial" rates.

McLeodUSA's repeated good faith attempts to negotiate wholesale replacement arrangements for loops and transport with Qwest following release of the *Omaha Order* have been met with Qwest's steadfast refusal to negotiate any wholesale pricing for the affected wire centers that deviates from its special access and RCP pricing. Qwest is exercising monopoly power by refusing to change its position on key points since it knows McLeodUSA has no alternative supplier of network elements. There simply is no market force constraining Qwest from offering a "take it or leave it" proposal. Of course, forcing competitive carriers out of the market means that those carriers' customers will be forced to go back to Qwest, thereby increasing the margin Qwest will realize from directly serving these end users.[141]

While Qwest has made commercial pricing for DS0 loops available for some time in Omaha, a review of the associated agreement reveals numerous unacceptable and onerous terms. For example, Qwest has priced the commercial two-wire DS0 loop rates nearly 30% higher than TELRIC rates, and has specifically excluded all wholesale performance standards from Qwest's

[141] While it may be true that mass market customers may choose to switch to Cox, *see Omaha Order*, ¶ 66, business customers, and in particular, small and medium sized customers served with T1 services, will not have a choice of facilities-based providers unless Cox is directly connected to each affected customer's premise with their own connection. The evidence in the Omaha docket did not indicate that Cox had actual connections to each business customer location, but only that Cox's network passed by in certain wire centers.

service offering, including Section 271 performance metrics.[142] Moreover, the commercial pricing for stand alone DS0 loops confirms the anticompetitive nature of Qwest's wholesale pricing. Qwest offers CLECs a lower-cost DS0 loop if the CLEC combines that loop with Qwest local switching. The identical loop facility is nearly 30% more expensive when purchased without Qwest local switching attached. Clearly, there is no cost justification for the significantly higher price point. Qwest is merely able to extract a 30% monopoly premium for the standalone DS0 loop since CLECs have no alternative. There is no "market incentive" since Qwest has no competition in the wholesale market for DS0 loops. This price discrimination is wholly inconsistent with the Commission's prediction that Qwest would offer network facilities at competitive rates for use in conjunction with a "competitor's own services and facilities."[143] Qwest's price discrimination appears to be intentionally designed to drive facilities-based competitors out of the market.

Another egregious illustration of Qwest's refusal to negotiate wholesale pricing involves the exorbitant non-recurring charges ("NRCs") that it seeks to impose for high capacity circuits. For example, to install a UNE DS1 loop and cross connect in Nebraska, the cost-based NRC is

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[142] *See* McLeodUSA Petition for Modification; Eben Declaration, ¶¶ 20, 24-25, and Exhibit 3, at 43-70 of 70 (Qwest's DS0 Loop Facility offering is attached to the MSA as Service Exhibit 1). According to Qwest's website, only one CLEC (TCG Omaha) has executed what appears to be Qwest's template agreement. *See* http://www.qwest.com/wholesale/clecs/commercialagreements.html.

[143] *Omaha Order*, ¶ 83.

$136.15.[144] For the Omaha MSA central offices where it has pricing flexibility, Qwest has set the NRC at $626.50.[145] That amounts to a 360% increase in NRCs that has resulted from the grant of forbearance.

Monthly recurring charges ("MRCs") also increase significantly in the forbearance wire centers. UNE DS1 loops in Zone 1 increase from $76.42 to a "price flex" rate of $182.22, a 138% increase.[146] The prospect of these enormous cost increases have already led McLeodUSA to significantly limit its Omaha operations. CLECs simply cannot be viable carriers in Omaha unless the wholesale pricing regime is significantly modified.[147]

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[144] McLeodUSA Petition for Modification, Eben Declaration, ¶ 27.

[145] Qwest has been granted pricing flexibility in all nine Omaha wire centers affected by the forbearance. *See Qwest Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 02-01, Memorandum Opinion and Order, 17 FCC Rcd 7363 (WCB Apr. 24, 2002) (granting Qwest Phase II pricing flexibility in the Omaha MSA, among other MSAs). This has permitted Qwest to *increase* its pricing for high capacity circuits. *See* Eben Declaration, ¶ 9. It therefore appears that Qwest's response to the grant of special access pricing deregulation was a better indicator of what Qwest would do once Section 251(c) UNEs were eliminated.

[146] McLeodUSA Petition for Modification, Eben Declaration, ¶ 6.

[147] To date, Qwest has continued to invoice McLeodUSA in the affected Omaha wire centers at UNE pricing. However, it is Qwest's position that it is entitled to re-rate all network elements in the affected wire centers to the March 2006 effective date of the *Omaha Order* and backbill McLeodUSA. Accordingly, for planning and financial purposes, McLeodUSA has had to operate as if the higher costs resulting from the loss of UNEs are already in effect. McLeodUSA is particularly disadvantaged because, in contrast to the *Anchorage Order*, where the Commission's grant of forbearance was conditioned on ACS's continued provision of local "legacy" loops pursuant to the existing rates, terms and conditions between ACS and GCI in Fairbanks, Alaska, until such time as commercial agreements were concluded, the *Omaha Order* contains no affirmative steps to establish interim pricing pending the negotiation of commercial replacement arrangements. *See Anchorage Order*, ¶¶ 39-42.

Qwest's persistent refusal to negotiate wholesale rates following the *Omaha Order* contravenes not only the Commission's predictive judgment regarding Qwest's conduct once forbearance was granted for Section 251(c)(3) loops and transport, but its Section 271 obligation to provide wholesale access to local loops, transport, and other network elements "at just and reasonable prices."[148] Because the Commission's predictive judgment was premised in part on Qwest's compliance with Section 271 pricing requirements, Qwest's flouting of this obligation provides further reason for the Commission to deny forbearance in any other MSA at this time.

Given all of this, there is no foundation for a "predictive judgment" that CLECs would be able to obtain competitive prices for wholesale access in a forborne environment. The necessity for, and the benefit of maintaining Qwest's UNE obligations is patent - it provides for robust competition in a given market. The predictive judgment of competitive prices in the *Omaha Order* was little more than wishful thinking and speculation. The Commission should avoid the same error in connection with the instant Petitions.

V. INDEPENDENT EVIDENCE SHOWS THAT QWEST DOES NOT FACE SUFFICIENT COMPETITION TO WARRANT FORBEARANCE

Apart from Qwest's weak and inconsistent showings of competition, , independent evidence, including findings by the Commission and other government authorities, precludes a finding that Qwest faces significant independent facilities-based competition that could warrant forbearance.

[148] *Omaha Order*, ¶ 103.

A. Independent Surveys and Government Reports Show that Qwest Possesses Bottleneck Control of Last Mile facilities in the Four MSAs at Issue.

Integra has recently conducted a survey of multi-tenant office buildings in several cities in the Qwest region, including Minneapolis, Phoenix, and Seattle to ascertain how many independent networks are typically physically present at these buildings. (See Attachment 2, First Declaration of Geoffrey Williams, Integra Telecom, Inc.). (Denver was not included because Integra does not provide service there.) During June 2007, whenever an Integra technician visited a building of an Integra customer for any reason, such as change of service or technical issues, the technician noted which providers had a fiber presence to the building. The total buildings surveyed are approximately only 1% of all buildings in which Integra has customers. The results were that in Minneapolis only 4 out of 61 buildings visited were served by competitive fiber; in Phoenix 3 out of 55 buildings were served by competitive fiber; and in Seattle 12 out of 217 buildings had competitive fiber. This survey shows that there are remarkably few commercial buildings in these MSAs that have competitive facilities, and that nearly all of the providers at the buildings surveyed were dependent on ILEC facilities to provide service.

Integra's survey is consistent with, and confirms, analyses and data of the Commission and the GAO. In *Local Competition: Status as of June 30, 2006*, the Commission presented its most up to date summary statistics on the state of competition in local telephone markets across

the United States.[149] Based on publicly available statewide data, the *Local Competition Report* shows that ILECs such as Qwest provide an overwhelming percentage of the residential and business lines in each market. In the residential market, ILECs control 71% of the lines in Arizona, 91% in Colorado, 85% in Minnesota, and 95% in Washington.[150] ILECs also control 68% of the business lines in Arizona, 86% in Colorado, 68% in Minnesota, and 69% in Washington.[151] It strains credibility for Qwest to argue that the residential market is competitive when the Commission's own data shows that, with the exception of Arizona, CLECs serve less than 16 percent of the market in any state. The picture is only slightly better in the business markets, where CLECs have managed to obtain a competitive toehold of less than on third of the market in every state. ILECs are still the strongest players in the market, and no amount of sophistry by Qwest should convince the Commission otherwise.

After examining the state of facilities-based competition in sixteen major metropolitan areas, including the Seattle, Phoenix, and Minneapolis MSAs now at issue, the GAO reached the conclusion that on average competitive facilities are present in "less than 6 percent of buildings with at least a DS-1 level of demand" and approximately 15 percent of buildings with a DS-3

[149] *Local Telephone Competition: Status as of June 30, 2006*, Industry Analysis and Technology Division, Wireline Competition Bureau (January 2007) ("*Local Competition Report June 30, 2006 Status*").

[150] *Id.*, at Tables 10-12.

[151] *Id.*

level of demand.[152] The picture is even more grim in the MSAs in which Qwest now seeks for forbearance. For example, in the Phoenix MSA the GAO found that only 3.7% of DS-1 buildings and 11% of DS-3 buildings are lit with competitive fiber.[153] Similarly, in the Seattle and Minneapolis MSAs only 3.8% and 5.7%, respectively, of DS-1 buildings are lit with competitive fiber.[154]

The GAO also found that rates for special access services, touted by Qwest as a competitive alternative, have generally increased where they are not regulated.[155] This is yet another indicator that facilities-based competition is not yet robust enough to constrain prices in the sixteen MSAs subject to the GAO study. In short, the GAO report reinforces the point that competition in the Phoenix, Seattle, and Minneapolis MSAs, and most likely in the Denver MSA though it was not studied, has not obtained the critical mass necessary to warrant the removal of the Act's unbundling and transport obligations.

In light of these figures, it is not possible for Qwest to claim that it faces significant independent facilities-based competition.

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[152] GAO Report at 12.

[153] *Id.* at 20.

[154] The numbers for DS-3 buildings are only slightly better, with 15% in Seattle and 21% in Minneapolis lit by competitive fiber.

[155] *See* GAO Report at 12-13.

B. Competitors Have Shown, and the Commission Has Found, that Competitors Are Rarely Able to Construct Last Mile Connections

The reason why competitive fiber extends to few buildings and that competitors remain dependent on Qwest facilities is that they are rarely able to justify construction of their own loops. The attached Declaration of David Bennett, Integra Telecom, Inc. (See Attachment 3) shows that it is rarely if ever economically feasible for competitors operating in Denver, Minneapolis, Phoenix, and Seattle to construct loops at the DS0, DS1, or DS3 level. The Commission has a wealth of information before it in other proceedings to the same effect. Most recently, PennTel, McLeodUSA, and DeltaCom have provided declarations to the effect that they are rarely able to find or construct alternatives to ILEC last mile facilities in the markets in which they operate.[156] Information and declarations of competitive carriers in the pending Verizon forbearance proceeding also show that competitive carriers cannot feasibly construct at these capacity levels.[157] And the Commission in the *TRRO* provided the analysis and further factual information explaining why this is the case -- the revenue opportunities at these capacity levels

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[156] Comments of ATX *et al.*, WC Docket No. 05-25, Declaration of Don Eben, McLeodUSA Telecommunications Services, ¶ 4, Declaration of Kevin J. Albaugh, Penn Telecom, Inc., ¶ 8, Declaration of Steven H. Brownworth, Deltacom, Inc., ¶¶ 3-4 (filed Aug. 8, 2007).

[157] *See, e.g.*, Comments of Time Warner Telecom, Inc., WC Docket No. 06-172, at 20-26 (filed Mar. 5, 2007).

are insufficient to justify construction.[158] The Commission has *never* found that CLECs would not be impaired if denied access to stand alone copper loops.[159]

Accordingly, because CLECs cannot feasibly construct last mile connections, it is not surprising that Qwest has not been able to demonstrate independent facilities-based competition at these capacities levels that could justify forbearance.

C. Independent Churn Studies Show that Cable Is Not a Significant Competitor

Integra has recently commissioned a study of its customer churn and to whom it loses customers, including in the MSAs in question. (See Attachment 4, Second Declaration of Geoffrey Williams, Integra Telecom, Inc.). In this study, Integra surveyed customers in six states in which it operates including Minnesota and Washington that, from July 2006 to through June 2007, had switched to other providers. This study shows one of the lowest churn rates in the industry and high customer satisfaction with the quality of Integra's services. This study additionally shows that Integra rarely if ever loses customers to cable operators. Of those customers who did switch from Integra to another telecommunications provider and for whom Integra was able to identify the new provider, only approximately 12% switched to a cable operator whereas approximately 81% switched to an ILEC or to a CLEC that uses ILEC wholesale facilities. These results simply confirm and illustrate the continuing dominance of the ILECs and the minimal

[158] *TRRO*, ¶¶ 150-154.

[159] *Id.*, ¶¶ 66 & 146.

penetration of the cable companies in both the retail and wholesale telecommunications markets for SME and enterprise services.

VI. FORBEARANCE FROM SECTION 251(C)(3) LOOP AND TRANSPORT UNBUNDLING WOULD BE CONTRARY TO THE PUBLIC INTEREST

Under the third prong of the forbearance analysis, Section 10(a)(3), the Commission should conclude that competitive access to § 251(c)(3) loop and transport UNEs in the four Qwest MSAs at issue remains vital to the public interest.[160] Section 10(b) states that before arriving at a contrary conclusion as Qwest asks, the Commission must find that the requested forbearance "will enhance [and] ... promote competition among providers of telecommunications services."[161]

In the *Omaha Order*, the Commission concluded that "granting Qwest relief from its loop and transport unbundling obligations in parts of the Omaha MSA will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by section 10(b)."[162] It further held that "the costs of unbundling obligations in parts of the Omaha MSA outweigh the benefits."[163] The Commission explained that forbearance in Omaha was in the public interest because regulatory intervention results in reduced incentives to innovate and invest in facilities as well as creating the complex regulations governing the

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[160] 47 U.S.C. § 160(a)(2).

[161] *Id.* at § 160(b).

[162] *Omaha Order*, ¶ 75.

[163] *Id.*, ¶ 76.

sharing of facilities.[164] It stated that the high degree of regulatory intervention required by the Telecommunications Act of 1996 to generate competition is no longer justified where "local exchange markets are sufficiently competitive," such as in the nine Omaha wire centers where Qwest was granted forbearance, and that forbearance would also serve the public interest by increasing regulatory parity in the Omaha telecommunications services market.[165]

In the *Anchorage Order*, the Commission concluded that relieving ACS from the section 251(c)(3) access obligations and section 252(d)(1) pricing obligations for loop and transport elements, subject to the condition it adopted, was in the public interest under section 10(a)(3).[166] It explained that the factors upon which its conclusions under Sections 10(a)(1) and (2) were based also convinced it that this relief will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by section 10(b).[167]

Even if these determinations were valid, the same cannot be said of the four markets where Qwest seeks § 251(c)(3) loop and transport unbundling relief. As shown below, Qwest's forbearance request fails to meet the Section 10(a)(3) public interest standard under the Commission's standards set forth in the *Omaha* and *Anchorage Orders.*

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[164] *Id.*

[165] *Id.*, ¶ 78.

[166] *Anchorage Order*, ¶ 49.

[167] *Id.*

First, the Section 10(a)(1) considerations discussed above demonstrate that Qwest's request for unbundling relief is not in the public interest. Second, as shown in Section IV, above, granting Qwest's request will not enhance [and] ... promote competition among providers of telecommunications services" as section 10(b) requires.[168]

Third, there is no evidence that Qwest's competitors have facilities that cover a percentage of the end user locations accessible from each of the wire centers in the four MSAs comparable to the market shares the Commission used as competitive thresholds in the *Omaha* and *ACS Orders*.[169] The Commission has emphasized that the public interest in establishing regulatory parity between competitive carriers and ILECs is *not* served until "the benefits of competition are sufficiently realized and competitive carriers have constructed their own last mile facilities and their own transport facilities."[170] Qwest has not satisfied this evidentiary burden and, as demonstrated above, it still remains the dominant provider of business and residential telecommunications services. Nor has Qwest shown that competitive wireline loop and transport facilities to end users ubiquitously exists throughout each of the four MSAs at issue.[171] Because adequate competitive facilities-based alternatives to Qwest's bottleneck facilities have not developed in the

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[168] 47 U.S.C. § 160(b).

[169] *Omaha Order*, ¶ 69; *see also Anchorage Order*, ¶ 31.

[170] *Omaha Order*, ¶ 78; *see also Anchorage Order*, ¶ 28.

[171] Furthermore, for the reasons stated in section IV.C above, intermodal competition from VoIP and Wireless providers are not substitutes for wireline services. For this reason, the Commission should not consider wireless or VoIP competition in determining whether Qwest's requested forbearance relief is in the public interest.

relevant MSAs, it would not be in the public interest to grant Qwest's forbearance petition as to § 251(c)(3) unbundling.

In the *Omaha Order*, the Commission made a "predictive judgment" that Qwest would not strand competitive investments by curtailing access to its analog, DS-0, DS-1, or DS-3-capacity facilities.[172] It postulated that Cox's ability to absorb customers onto its proprietary network would supply enough competitive pressure to force Qwest to "maximize use of its existing local exchange network, providing service at retail *and at wholesale*."[173] The Commission predicted this because Cox had its own loops and transport connected to a certain percentage of Qwest's end-users in the nine wire centers in Omaha, and thus the potential existed that Cox would absorb customers into its proprietary network. The Commission made similar findings in the *Anchorage Order* with respect to the five wire centers where forbearance relief was granted.[174] However, as noted throughout this Opposition, unlike Omaha and ACS, Qwest has not attempted to demonstrate that its competitors have facilities deployed to a substantial portion of the end users throughout each of the wire centers in each of the four MSAs and can absorb

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[172] *Omaha Order*, ¶ 80.

[173] *Id.*, ¶ 81.

[174] *See Anchorage Order*, ¶¶ 44 & 49. The Commission emphasized that given "GCI's increasing ability to absorb customers over its own last-mile facilities, ACS will be subject to very strong market incentives to ensure that its network is used to optimal capacity – irrespective of any legal mandate that it do so." *Id.*, ¶ 49. "Faced with aggressive 'off-net' competition from GCI," the Commission predicted that "ACS will endeavor to maximize use of its existing local exchange network, providing service at retail and at wholesale, in order to minimize revenue losses resulting from customer defections to GCI's service." *Id.*

customers without any reliance on Qwest's facilities. Lacking such evidence, the Commission cannot conclude that Qwest would face similar competitive pressure and thus there is no reason to believe Qwest will not curtail competitive access to its facilities.

Similarly, it would be a mistake for the Commission to conclude that Qwest's existing obligations to offer special access or section 271 loop and transport facilities are sufficient alternatives to § 251(c)(3) facilities. The Commission's prediction to that effect in Omaha has been proven wrong by experience.[175] Further, market pressures in the four MSAs at issue here have not forced Qwest to reduce its special access rates; rather, it has increased them. The simple fact is that § 251(c)(3) loop and transport forbearance will harm competition in MSAs where Qwest seeks it. Qwest has failed to satisfy the standards set in the *Omaha Order*, much less demonstrate that forbearance "will enhance [and] ... promote competition among providers of telecommunications services."[176] Rather, removing Qwest's unbundling obligations will thwart competition by forcing competitive carriers with no other options to purchase loops and transport at above-market prices. This will undermine their ability to compete, which runs contrary to the public interest standard.

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[175] *See* McLeodUSA Petition for Modification; *see also* Letter from Chris MacFarland, Group Vice President - Chief Technology Officer, McLeodUSA, to Marlene Dortch, Secretary, FCC, WC Docket 05-281 (filed Dec. 15, 2006) (explaining that because forbearance granted by the FCC in the Omaha Market has made it extremely difficult for McLeodUSA to remain in the Omaha market and has severely devalued the investment in its network facilities in the market, McLeodUSA "will either sell or cease its operations in the market, despite its enormous investment in its own network and facilities").

[176] 47 U.S.C. § 160(b).

Accordingly, the Commission may not conclude that the requested forbearance would be in the public interest.

VII. FORBEARANCE FROM SECTION 251(C)(3) LOOP AND TRANSPORT UNBUNDLING IS UNLAWFUL

Qwest's Petitions claim that unbundling relief is justified by the Commission's analysis in the *Omaha Order* and the *Anchorage Order* where the Commission granted forbearance from § 251(c)(3) loop and transport unbundling obligations. However, as shown below, the analysis in these two orders remains flawed, and the Commission should not exacerbate its error by granting Qwest's Petitions for § 251(c)(3) unbundling relief.

A. The Commission May Not Decouple § 10 Forbearance from § 251(d)(2) Impairment

1. The language and structure of § 10 require that the Commission include the § 251(d)(2) impairment standard in evaluating ILEC requests for forbearance from § 251(c)(3) unbundling

Section 10(b) directs the Commission to "consider whether forbearance ... will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services." 47 U.S.C. § 160(b). The primary tool Congress conferred on the Commission to assess competition among providers of telecommunications services was the market opening provisions of section 251(c) and the impairment standard of section 251(d)(2). In other words, impairment remains the "touchstone" for assessing

whether competitive entry into monopoly markets is achievable absent access to parts of the incumbent's network.[177]

The Commission may not reasonably determine the impact on competition as required under Section 10(b) without applying its "touchstone" impairment test. Forbearance from unbundling obligations in circumstances where CLECs are impaired thwarts development of facilities-based alternatives to incumbent networks. As noted elsewhere in this Opposition, in a forborne environment CLECs become subject to higher prices and unreasonable terms and conditions of service in the vast majority of circumstances where they remain dependent on ILEC last mile facilities to serve customers such as mass market and SME customers to whom it is never economic to construct loops. Thus, section 10(d) effectively requires the FCC to apply its impairment analysis when an ILEC seeks forbearance requested from section 251's mechanisms designed to induce competition between telecommunications providers. The "fully implemented" requirement of Section 10(d), for example, directly links forbearance to the Act's unbundling provisions in sections 251 and 271. Therefore, the Commission must consider the extent to which competitors are impaired under Section 251(d)(2) before granting forbearance from the Act's unbundling requirements. The Commission should not repeat its failure to perform this test in either the *Omaha or Anchorage Orders*.[178]

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[177] *See United States Telecom Ass'n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002).

[178] If the Commission applies a different test than the carefully crafted impairment test, it must provide a rational explanation for its departure from precedent. This explanation must include a thorough explanation of how its standard for evaluating impairment under section 10 is